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No. 94-529

In the Supreme Court of the United States

OCTOBER TERM, 1994

LOT 5, FOX GROVE, ALACHUA COUNTY, FLORIDA,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether real property that is used to facilitate federal drug trafficking crimes, and that is therefore subject to forfeiture under 21 U.S.C. 881(a)(7), is exempted from forfeiture by a Florida state "homestead" provision.

2. Whether petitioner defaulted any claim that forfeiture was constitutionally excessive by failing to raise it in the district court and by failing to raise it in a timely fashion on appeal.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 23 F.3d 359.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1994. The petition for a writ of certiorari was filed on September 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States District Court for the Northern District of Florida found probable cause that petitioner Savanah Wims' Florida residence[1] had been used to facilitate the commission of federal drug trafficking offenses. After petitioner failed to offer any contrary evidence at trial, the court ordered the residence forfeited to the United States, pursuant to 21 U.S.C. 881(a)(7). The court of appeals affirmed. Pet. App. 1a-13a.

1. In April 1992, the United States filed a civil action seeking forfeiture of petitioner's Florida residence, pursuant to 21 U.S.C. 881(a)(7), on the ground that it had been used to facilitate the commission of federal drug trafficking offenses. Petitioner filed a claim to the property and an answer asserting the defenses that the property was exempt from federal forfeiture as a result of the Florida "homestead" provision (Fla. Const. Art. X, § 4) and that petitioner was an innocent owner. Pet. App. 2a.

In January 1993, at a pretrial conference, the district court rejected petitioner's defense that the property was immunized from federal forfeiture by the Florida homestead provision. The court then bifurcated the proceeding so that it first would determine whether the government had shown probable cause that the property was used to facilitate a drug trafficking crime and the jury then would determine whether petitioner had shown that any such crime was committed without her knowledge or consent. See 19 U.S.C. 1615 (establishing

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[1] Savanah Wims is the owner of the property that was the subject of the forfeiture proceeding below. Because she has pursued this challenge to the forfeiture of that property, she is referred to herein as "petitioner."

respective burdens), incorporated by 21 U.S.C. 881(d). Pet. App. 2a.

The government, to establish probable cause, offered testimony of Alachua County Detective James Brown and Drug Enforcement Administration Special Agent Michael Lee. The testimony indicated that petitioner had used her home to facilitate the distribution of large quantities of cocaine and the receipt of large sums of money. Pablo Cruz told Detective Brown that, during the course of the conspiracy, he had sold more than 100 kilograms of cocaine to petitioner's husband Roosevelt Wims and that he and Roosevelt Wims discussed drug transactions while at the property. Moreover, petitioner's stepsons—Tim Wims, Deon Wims, and Otis Brown—admitted to Detective Brown that they had stored drugs and drug proceeds at petitioner's home. Pet. App. 2a-3a.

The testimony at the probable cause hearing further showed that petitioner knew of, and used her home to facilitate, large-scale drug trafficking by her husband and stepsons. For example, Tim Wims admitted to the officers that he had given petitioner $25,000 in drug proceeds to hold for him at the home, and that Tim Wims drew from those funds over time. Likewise, petitioner's stepsons confirmed that petitioner had held and counted drug money for Otis Brown at the residence. Moreover, two kilograms of cocaine had been stored in petitioner's garage and later delivered in petitioner's car to J.C. Wims (petitioner's brother-in-law) in New York. Western Union records showed that J.C. Wims transferred large sums of money to petitioner. Pet. App. 2a-3a.

Following the testimony of Detective Brown and Agent Lee, petitioner stipulated that probable cause had been established. After the judge denied her motion to

stay the civil case pending an expected criminal indictment, petitioner rested without presenting a defense. Because the government's evidence of probable cause was uncontradicted, the court ordered the property forfeited to the United States. Pet. App. 3a-4a.

2. The court of appeals affirmed. Pet. App. 1a-13a. The court held that the federal forfeiture provision covering real property used to facilitate drug trafficking preempted the Florida state homestead provision. *Id.* at 4a-10a (relying on the Supremacy Clause, U.S. Const. Art. VI, Cl. 2). It explained that, while a "federal statute does not supersede state law unless that is the clear and whole purpose of Congress," congressional "intent may be expressly stated in the language of the statute or implicitly contained in its structure and purpose." Pet. App. 5a (citing *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992)). The court rejected petitioner's suggestion that "a broad, new constitutional rule" requiring a "plain statement" and "unmistakably clear" intent to preempt had been established in *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). Pet. App. 5a-7a. Instead, the court distinguished *Gregory*, which involved the applicability of federal age discrimination requirements to state judges, as a case involving "the very essence of state sovereignty and political determination." *Id.* at 6a. In contrast, "a conclusion that Florida's homestead protection is preempted by federal civil forfeiture law would not affect Florida's sovereignty because Florida's homestead provision is a substantive policy choice, not a means of sovereign definition." *Id.* at 7a.

Turning to the specific issue of congressional intent under 21 U.S.C. 881(a)(7), the court observed that "§ 881(a)(7) states that all real property, without limitation or qualification, is subject to forfeiture." Pet. App. 8a. And, it noted, "the legislative history evinces

specific intent to extend civil forfeiture to homesteads." *Id.* at 9a (citing S. Rep. No. 225, 98th Cong., 2d Sess. 195 (1984)). The court concluded that "§ 881(a)(7) conflicts with" the Florida homestead provision because "to carve out an exception for homestead under federal law would negate the plain meaning of § 881(a)(7) and frustrate its purpose." Pet. App. 9a-10a.[2]

Petitioner did not argue at trial, in her opening brief, or in her reply brief, that the forfeiture here was an excessive penalty in violation of the Constitution. After appellate briefing was complete, however, petitioner moved for permission to file a supplemental brief raising such an argument based on *Austin* v. *United States*, 113 S. Ct. 2801 (1993), which was decided after petitioner had filed her opening brief, but before she had filed her reply brief. The court of appeals denied that motion. Pet. App. 20a-21a. It also denied a renewed motion to the same effect. *Id.* at 14a-15a. Accordingly, neither the district court nor the court of appeals reviewed petitioner's constitutional claim.

ARGUMENT

1. The court of appeals, in a decision that conflicts with no other case, correctly held that real property used to facilitate drug trafficking crimes is subject to federal forfeiture notwithstanding a state homestead provision. Under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, Congress has the unquestioned authority to preempt state laws that stand as an obstacle to achieving a legitimate federal purpose. *M'Culloch* v.

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[2] The court also held that the district court had not abused its discretion by denying petitioner's motion to stay the forfeiture trial. Pet. App. 10a-13a. Petitioner does not renew that contention here.

Maryland, 17 U.S. (4 Wheat.) 316, 417 (1819). Congress may express its preemptive intent by an explicit provision of law, or by implication. "In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference the Congress left no room for the states to supplement it." *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992) (citations and quotation marks omitted).

Congress has provided that "[a]ll real property" used to facilitate a federal drug trafficking crime "shall be forfeited" unless the owner establishes the crime was committed without her knowledge or consent. 21 U.S.C. 881(a)(7). The legislative history confirms that Congress viewed forfeiture of a drug offender's "house" as a "powerful deterrent" to drug crimes. S. Rep. No. 225, 98th Cong., 2d Sess. 195 (1984). State laws that purport to protect drug offenders against forfeiture of their homes conflict with the language of 21 U.S.C. 881(a)(7). Moreover, if state policies were permitted to override federal forfeiture statutes, it would remove what Congress intended as a deterrent to drug crimes. The Florida homestead provision must, therefore, give way to federal forfeiture law. *United States* v. *One Single Family Residence*, 13 F.3d 1493, 1497-1498 (11th Cir. 1994); see also *United States* v. *Curtis*, 965 F.2d 610, 616-617 (8th Cir. 1992) (property subject to criminal forfeiture notwithstanding Iowa homestead exemption); *United States* v. *One Parcel of Property*, 786 F. Supp. 1497, 1503-1505 (N.D. Iowa 1991) (property subject to civil forfeiture notwithstanding Iowa homestead exemption). Cf. *United States* v. *Rodgers*, 461 U.S. 677, 700-702 (1983) (Texas homestead provision preempted by federal tax lien statute).

Petitioner nonetheless argues (Pet. 8-18) that Congress did not express preemptive intent with the "plain statement" necessary under *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). The issue in that case was whether the federal Age Discrimination in Employment Act of 1967 (ADEA) applied to state judges who were subject to mandatory retirement under state law. Congress had clearly intended to cover some state employees under the ADEA, but it had also exempted certain elected and appointed officials with "policymaking" responsibilities. See 501 U.S. at 464-465 (quoting 29 U.S.C. 630(f)). This Court, in considering whether Congress had preempted state laws that impose age qualifications on state judges, stressed that establishing judicial qualifications is "a decision of the most fundamental sort for a sovereign entity" because "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." 501 U.S. at 460; see also *id.* at 463 (State's "authority * * * lies at the heart of representative government") (internal quotation marks omitted). Before it would interpret the ADEA to override that aspect of state sovereignty, the Court required a "plain statement" demonstrating preemptive intent. *Id.* at 461. It found such a plain statement lacking, because "[i]n light of the ADEA's clear exclusion of most important public officials, it is at least ambiguous whether Congress intended that appointed judges nonetheless be included." *Id.* at 470.

Petitioner's reliance on *Gregory* is misplaced, for two reasons. First, as the court of appeals explained, Missouri's judicial qualification law "went to the very essence of state sovereignty and political determination," whereas preemption of Florida's homestead provision does "not affect Florida's sovereignty because

Florida's homestead protection is a substantive policy choice, not a means of sovereign definition." Pet. App. 6a-7a. While state realty laws are essential (*BFP* v. *Resolution Trust Corp.*, 114 S. Ct. 1757, 1764-1765 (1994)), federal law "can of course override [them] by implication when the implication is unambiguous." *Id.* at 1765.[3] Second, Congress used clear and unambiguous language in making "[a]ll real property" subject to forfeiture when knowingly used by the owner to facilitate federal drug crimes (21 U.S.C. 881(a)(7)). Unlike *Gregory*, where the Court found congressional intent "ambiguous" as to the inclusion of state judges (501 U.S. at 470), there is no question that Congress intended to forfeit a drug offender's home. Cf. *United States* v. *Monsanto*, 491 U.S. 600, 609 (1989) (criminal forfeiture provision "is broad and unambiguous, and Congress' failure to supplement [21 U.S.C.] § 853(a)'s comprehensive phrase—'*any* property'—with an exclamatory 'and we even mean assets to be used to pay an attorney' does not lessen the force of the statute's plain language").

2. Petitioner also claims (Pet. 18-19) that under *Austin* v. *United States*, 113 S. Ct. 2801 (1993), forfeiture of her home was a constitutionally excessive penalty. Petitioner did not raise that claim in the district court, in her opening brief on appeal (filed after *Austin* had been argued), or in her reply brief (filed after *Austin* was decided).[4] Courts of appeals have held that arguments

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[3] In contrast, the application of federal age discrimination law to state judges in *Gregory* raised serious constitutional questions that the Court was able to avoid through its "plain statement" rule. See 501 U.S. at 467-470.

[4] Petitioner's reply brief cited *Austin* as having an "impact" upon her two properly preserved appellate claims (the preemption

raised for the first time in a reply brief are not properly preserved. See, *e.g.*, *United States* v. *Perkins*, 994 F.2d 1184, 1191 (6th Cir.), cert. denied, 114 S. Ct. 279 (1993); *United States* v. *Saunders*, 951 F.2d 1065, 1069 (9th Cir. 1991). The court of appeals here did not abuse its discretion in denying petitioner's motions, filed after her reply brief, seeking to raise a supplemental argument that had not been asserted below.

Petitioner nonetheless argues that preclusion of her belated argument contravenes "the basic rules of retroactive application of Supreme Court decisions" (Pet. 19). It is true that *Austin* applies to cases that were not yet final on direct appeal at the time of the Court's decision. Cf. *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6, 328 (1987) (case is not final on direct appeal until certiorari is denied or the time for filing a petition for certiorari has expired). Petitioner's reliance on *Austin* fails, however, not because of any principle of retroactivity but because petitioner never timely claimed that the forfeiture was excessive or disproportionate to petitioner's wrongdoing, and the courts below never considered that issue. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 112 S. Ct. 1735, 1738 (1992) (internal quotation marks omitted).

There is nothing about this case that would justify an exception to the Court's traditional rule against considering issues neither raised nor considered in the lower courts. Petitioner's failure to raise the claim cannot be excused by the rejection of a similar claim in a

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and stay issues), but the brief did not separately argue that the forfeiture was constitutionally excessive. See Pet. C.A. Reply Br. 12, 17.

prior Eleventh Circuit case (*United States* v. *Real Property & Residence*, 921 F.2d 1551, 1557 (1991)). There was contrary law from at least one other circuit by the time of trial (*United States* v. *Certain Real Properties & Premises*, 954 F.2d 29, 33-39 (2d Cir.), cert. denied, 113 S. Ct. 55 (1992)), and this Court had granted certiorari in *Austin* months before the filing of petitioner's appellate briefs. See 113 S. Ct. 1036 (1993). Moreover, the existence of unfavorable circuit precedent does not generally excuse failure to raise a claim properly in the lower courts. Cf. *Engle* v. *Isaac*, 456 U.S. 107, 130 (1982) ("the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial").[5] Review would be particularly inappropriate here, because petitioner's default precluded development of the record on the claim now made under *Austin*.

In any event, there is no basis for believing that the forfeiture here raises constitutional concerns. While *Austin* did not decide the specific standards that should govern proportionality review (see 113 S. Ct. at 2812 & n.15), the forfeiture here was not disproportionate, and certainly not plainly disproportionate, under any reasonable approach to that issue. For example, Justice Scalia has suggested that the sole inquiry should be "whether the confiscated property has a close enough relationship to the offense." *Austin*, 113 S. Ct. at 2815 (concurring

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[5] For similar reasons, petitioner has defaulted any claim under *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993). See Pet. 18-19. We note in any event that the rule established there—that the government generally is not entitled to ex parte seizure of real property (114 S. Ct. at 498-505)—would not avail petitioner, whose house has now been forfeited after a judicial proceeding in which she fully participated.

opinion; emphasis omitted). Here, where large quantities of illegal drugs and drug proceeds were stored in petitioner's house, the forfeiture of that house had a direct relation to the offense. And even if the proportionality inquiry required a relationship between the financial magnitude of the crime and the value of the property forfeited, the large sums of money (including $25,000 in drug proceeds held by petitioner on one occasion) and quantities of drugs (including two kilograms of cocaine on another occasion) stored at the house, not to mention the considerable scope of the overall conspiracy, sufficed to support forfeiture. Accordingly, there is no basis for initial review in this Court of petitioner's defaulted Eighth Amendment claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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